

<b>1. OVERVIEW.....</b>	<b>1</b>
<b>2. ROLE OF PMMD IN THE PROCUREMENT PROCESS .....</b>	<b>3</b>
<b>a) The expertise lies within the initiating department.....</b>	<b>5</b>
i) PMMD reasonably relied on the expertise within the initiating department.....	6
<b>3. I&amp;T DROVE THE MOVE TO LEASING .....</b>	<b>7</b>
<b>a) I&amp;T sought to establish a single vendor of record .....</b>	<b>9</b>
<b>4. POWER WAS NOT A LEASING EXPERT .....</b>	<b>11</b>
<b>5. POWER DRAFTED THE RFQ.....</b>	<b>13</b>
<b>a) Andrew emailed Kassam draft RFQ to Power for review .....</b>	<b>14</b>
<b>b) The limited role of Treasury: May 1999 meeting between I&amp;T and Treasury.....</b>	<b>15</b>
<b>c) May 7, 1999 draft RFQ.....</b>	<b>17</b>
<b>d) Andrew sent draft RFQ to Jakobek (May 17, 1999).....</b>	<b>18</b>
<b>e) Power emailed draft RFQ to Viinamae and Franey for review (May 18, 1999) .....</b>	<b>20</b>
<b>f) Power sent revised draft to Brittain (May 26, 1999).....</b>	<b>21</b>
<b>g) Spizarsky forwarded May 26 draft to Beattie.....</b>	<b>22</b>
<b>h) RFP versus RFQ .....</b>	<b>23</b>
i) I&T wanted to create a vendor of record relationship.....	24
ii) I&T never told Treasury it wanted to create a vendor of record relationship .....	25
iii) Comparison of the May 26, 1999 draft to the RFQ .....	26
iv) Legal advice.....	27
<b>6. RFQ WAS ISSUED MAY 31, 1999.....</b>	<b>28</b>
<b>a) Addendum on June 7, 1999.....</b>	<b>31</b>
<b>b) RFQ closed at noon on June 11, 1999.....</b>	<b>32</b>
i) Domi phone call to Andrew that morning.....	32
<b>c) PMMD process to open bids .....</b>	<b>32</b>
i) Responses to the RFQ .....	34
ii) June 11, 1999 memorandum .....	35

## 1. Overview

1. In the Spring of 1999, I&T became convinced that leasing was the best way to upgrade its computer technology assets. Although the department had already started purchasing large number of laptops and desktops, I&T was attracted to leasing because it alleviated the need to obtain periodic Council approval for capital expenditures. This, I&T believed, would facilitate more frequent upgrades. I&T was also persuaded that the offer by leasing companies such as MFP of free asset management reduced the need to significantly increase the I&T staff complement to address labour intensive tasks of managing and disposing computer inventory.

2. Andrew delegated responsibility for drafting the leasing tender documents to Power, an I&T consultant. Power had primary responsibility for drafting the RFQ. PMMD had no role in selecting or supervising Power. Power was not hired by either PMMD or Treasury. He did not report to anyone in PMMD or Treasury, nor did PMMD or Treasury have responsibility for supervising his work.

3. The RFQ drafting process led by Power was plagued by poor communication between I&T staff and both PMMD staff and Treasury staff, particularly with respect to the overriding objectives of the tender. Andrew, Power, and Viinamae gave evidence that I&T envisaged a competition for an open-ended leasing “vendor of record” with no pre-defined limit on the amount of equipment, no pre-specified lease terms, and no competitive process to obtain future lease rates, I&T never communicated this key point to anyone in PMMD or Treasury. Had this been communicated, PMMD would have approached the draft procurement document very differently. Likewise, the weight of the evidence supports the conclusion that I&T did not adequately inform anyone in Finance, including Liczyk, that this was I&T’s goal.

4. If I&T’s objective was in fact to secure such a leasing vendor of record, then the City erred by issuing an RFQ as opposed to an RFP. That said, and as is set out in greater detail in Chapter 7, it is very unlikely that Finance would have sanctioned a

vendor of record leasing relationship since it would have created so many potential financial pitfalls for the City. By either hiding I&T's wish for a leasing vendor of record from Treasury or simply failing to make the point clearly, I&T's vision was never subjected to a probing financial analysis that would have undoubtedly revealed its fundamental flaws.

5. In other words, the primary deficiency in the RFQ drafting process was not the selection of an RFQ as opposed to an RFP but was the failure of I&T to clearly think through its computer technology objectives and to clearly articulate them to staff in the other City departments assisting in the procurement exercise. As is discussed at length in Chapters 7 and 12, this same underlying problem was largely responsible for any ambiguities in the P&F Report to Council and for the misadventures in the CMO.

6. Unbeknownst to Power, Viinamae, Rabadi and Brittain – those involved in drafting or overseeing the RFQ drafting – Jakobek asked Andrew to send him a draft. On May 17, 1999, less than two weeks before it was issued, Andrew emailed his working draft to Jakobek. Jakobek's request to review a draft tender document was unprecedented and the witnesses at the Inquiry were unanimous: drafting a tender document is a staff run process in which Councillors do not, and should not, participate in any way. Jakobek made his unprecedented request only two weeks after returning from his private jet jaunt to Philadelphia, paid for by MFP.

7. The form and content of the City's RFQ did not materially contribute to the City's improvident transactions with MFP. The deal MFP promised in its RFQ response was never signed. The City asked for a deal it never got and MFP got a deal it never bid on. MFP pulled off a classic bait and switch. All of the City's work in preparing its RFQ, analyzing the various responses, comparing the responses to the cost of financing the acquisition through debentures, and drafting the report to Council was rendered irrelevant. None of these elements of the procurement exercise materially contributed to the City's improvident transaction with MFP.

## 2. Role of PMMD in the procurement process

8. The “purchasing” arm of PMMD was responsible for purchases made for the departments, boards, and commissions of the City of Toronto above the purchase limit of \$7500 dollars.<sup>1</sup> The “materials management” arm of PMMD was responsible for maintaining warehouses for the City, from which departments were able to draw goods.<sup>2</sup>

9. The City’s interim Purchasing Bylaw set out the balance between the PMMD and the City’s departments.

Since the award of the vast majority of contracts is made to the lowest bidder meeting the specifications and requirements, the award itself is an administrative decision which may properly be delegated to staff, so long as Council is satisfied that procedures are in place ensuring an open, fair and competitive process providing reasonable access to potential bidders and the opportunity to supply goods and services or carry out construction contracts on behalf of the City through a fair, transparent, open and competitive process which is fairly administered.<sup>3</sup>

10. There were three stages of the procurement process. First, a department within the City of Toronto identified a purchasing need. This initiating department submitted a purchase requisition to PMMD, which was a request to solicit bids for a certain purchase (“Requisition”).<sup>4</sup> The initiating department was responsible for determining what kinds of tools, goods or services were required. PMMD did not question the needs identified in the Requisition.<sup>5</sup> PMMD relied on the department initiating the procurement to provide all of the necessary substantive information. PMMD was charged with providing an open, fair, and competitive tender process.<sup>6</sup> Pagano explained the role of PMMD succinctly:

Q: It's a convoluted way of saying that -- that the initiating departments are where you would expect to see the expertise on what the need is?

---

<sup>1</sup> Pagano 02/24/2003 at 105.

<sup>2</sup> Pagano 02/24/2003 at 105-106.

<sup>3</sup> COT031528 at COT031530, 3:1:7; Pagano 02/24/2003 at 145-146.

<sup>4</sup> Pagano 02/24/2003 at 152.

<sup>5</sup> Pagano 02/24/2003 at 153-154.

<sup>6</sup> Pagano 02/24/2003 at 154.

A: That's correct, I -- my understanding of Purchasing's role, is that we are responsible for the process; the expertise lies within the Department.<sup>7</sup>

11. Second, the Manager of the Purchasing Goods and Services Group assigned the Requisition to a buyer. The buyer prepared a draft quotation call document.<sup>8</sup> Certain standard purchasing documents were attached to every RFQ. These documents were referred to as “boilerplate” provisions. The buyer then combined the initiating department’s Requisition with the City’s boilerplate provisions.<sup>9</sup> The resulting document was essentially a draft tender document, which was often reviewed with the initiating department prior to being issued. PMMD could provide assistance to the initiating department, if required, to determine what kind of tender document should be issued.<sup>10</sup>

12. Finally, PMMD sent this document to the bidders on the City’s bidders list and advertised the opportunity on the City website.<sup>11</sup>

13. After the closing date specified, PMMD summarized the bids received and forwarded the results to the initiating department.<sup>12</sup> The initiating department evaluated the bids and sent a letter of recommendation to PMMD. PMMD reviewed the letter of recommendation for accuracy and compliance with PMMD policies.<sup>13</sup> For purchase transactions exceeding 2.5 million dollars, PMMD prepared a report to the Standing Committee for forwarding to City Council, which made the award.<sup>14</sup> If the recommendation was approved, then PMMD created one of two documents: a) a blanket contract; or b) a purchase order.<sup>15</sup> PMMD issued a purchase order for one-time purchases, wherein the purchase was completed after delivery is made. In contrast, a blanket contract:

---

<sup>7</sup> Pagano 02/24/2003 at 130-131.

<sup>8</sup> Pagano 02/24/2003 at 156.

<sup>9</sup> Pagano 02/24/2003 at 156-157.

<sup>10</sup> Pagano 02/24/2003 at 157.

<sup>11</sup> Pagano 02/24/2003 at 157.

<sup>12</sup> COT030534, 20:1:32.

<sup>13</sup> COT030534, 20:1:32.

<sup>14</sup> COT030534, 20:1:32.

<sup>15</sup> Pagano 02/24/2003 at 211-212.

[H]as an upset limit for a specific time period, where the Department can purchase the similar items against that contract, to a contract release order. It's already been -- the prices have already been negotiated, approval for awards has already been received. It's set up in the system as a blanket contract, so that when the department needs the requirements, they can issue a contract release order, against a contract thus buying the product directly, without having to go through purchasing each time.<sup>16</sup>

14. There were two situations in which City Council had to approve a purchase transaction:

- a. any purchase transaction exceeding \$5 million dollars; and
- b. any purchase transaction in which the lowest bidder meeting the requisite specifications was not recommended for award of the contract.<sup>17</sup>

15. Pagano testified that the point of using the open, fair, and competitive procurement process was to obtain the best price and value for the taxpayers' dollars.<sup>18</sup> In Pagano's mind, the single most important criterion for the RFQ was the lowest lease rate per one thousand dollars of equipment put on lease.<sup>19</sup>

***a) The expertise lies within the initiating department***

16. PMMD facilitated the purchase of a diverse spectrum of commodities from computer equipment to paper to petroleum products to furniture.<sup>20</sup> Therefore, PMMD could not be expected to have detailed knowledge about any of the particular goods being acquired. As Pagano testified:

Q: Would you expect any of your buyers within, let's just take Goods and Services group 2, and or the manager, to have a detailed knowledge, technical knowledge about all of these areas that are listed here?

---

<sup>16</sup> Pagano 02/24/2003 at 212.

<sup>17</sup> Pagano 02/24/2003 at 129.

<sup>18</sup> Pagano 02/24/2003 at 140-141.

<sup>19</sup> Pagano 02/24/2003 at 141-142.

<sup>20</sup> Pagano 03/05/2003 at 18-19.

A: No, I would not expect that.

Q: Of either of your staff or your managers?

A: That's correct, yes.<sup>21</sup>

17. PMMD expected, rightly, that the initiating department had, or would obtain, the expertise necessary to understand the goods or services the initiating department needed and why they needed them.

18. PMMD did not have the authority to challenge departments on their expertise, or to question whether an expert retained by a department, such as Power, had sufficient expertise to adequately identify and define departmental needs.<sup>22</sup> Moreover, as Director of PMMD, Pagano did not have the authority to do anything other than make recommendations to departments – he could not direct them to do anything.<sup>23</sup>

***i) PMMD reasonably relied on the expertise within the initiating department***

19. Neither Pagano nor Beattie had any substantive experience with computer leasing.<sup>24</sup> Upon reflection, Beattie confirmed that he did not know of anyone in the PMMD who had any experience with leasing.<sup>25</sup> PMMD was entitled to rely on the expertise within I&T, particularly since it was widely understood that Power had leasing expertise. Unfortunately Power did not.

---

<sup>21</sup> Pagano 03/05/2003 at 19-20.

<sup>22</sup> Beattie Affidavit, para. 45, 03/31/2003 at 70-71.

<sup>23</sup> Pagano 03/05/2003 at 72.

<sup>24</sup> Beattie Affidavit, paras. 30, 41, 03/31/2003 at 65, 69.

<sup>25</sup> Beattie 04/01/2003 at 6.

### 3. I&T drove the move to leasing

20. By 1999, I&T was seriously concerned about its ability to upgrade its computer technology efficiently. Andrew was attracted to leasing because he thought it alleviated the need to obtain periodic Council approval for major capital expenditures.<sup>26</sup> This made frequent upgrades of technology easier. Leasing companies also purported to offer other benefits such as asset management and disposition that were attractive to a department with an already overburdened staff. Power further confirmed that both he and Andrew supported leasing.<sup>27</sup>

Q: And so at least from an IT perspective, you agree with me that if there -- if there was one (1) person who was responsible for driving the concept of leasing forward, it was Mr. Andrew?

A: He would be one (1) person, yes.

Q: Well, he's the person, isn't he, Mr. Power?

A: From the IT perspective?

Q: Yes.

A: Yes, poss -- yes.

Q: And he was the highest ranking IT person in the City?

A: Yes.

Q: And so your best estimate, sir, is that -- is that to the extent that there was an IT -- as you put it, IT involvement in the discussions, that led to the decision to lease, that was Mr. Andrew who would have led those discussions for IT?

A: Yes.<sup>28</sup>

21. Power believed that Finance was interested in leasing to level the operating budget and to obtain the benefits of off-balance sheet financing, which meant that the

---

<sup>26</sup> Power 03/27/2003 at 91.

<sup>27</sup> Power 03/27/2003 at 93.

<sup>28</sup> Power 03/27/2003 at 94-95.



City's aggregate level of capital indebtedness would not increase if it chose to lease.<sup>29</sup> However, Rabadi testified that this alleged benefit was in fact of no benefit to the City because in a public sector organization, leasing would appear on the balance sheet regardless.<sup>30</sup> There is no reason to doubt Rabadi's evidence on this point.

22. From his conversations with Andrew, Power surmised that Liczyk was the primary supporter of leasing from Finance.<sup>31</sup> Andrew had not mentioned anybody else from Finance as a "driving force" behind leasing.<sup>32</sup> Power could not recall any conversation with PMMD that would have led him to consider PMMD a "driving force" behind leasing, nor did he consider that PMMD would logically assume such a role.<sup>33</sup>

23. On January 27, 1999, Andrew and Viinamae met with Brittain and Willschick.<sup>34</sup> Brittain explained that this was only a preliminary meeting to assess whether or not leasing could provide any financial benefit given the City of Toronto's high credit rating.<sup>35</sup> He did not believe that there were any specific discussions about an RFQ or the intended acquisitions.<sup>36</sup> Brittain testified that Willschick was present because he had expertise with respect to capital markets, interest rates, and the cost of funds generally.<sup>37</sup> He remembered the participants expressing interest in exploring alternative ways of managing the City's assets.<sup>38</sup>

24. Andrew indicated that the purpose of the meeting was for I&T to keep Finance informed of the proposal and to obtain information from Brittain and Treasury. He recalled that Liczyk or someone in Treasury asked him to contact Brittain.<sup>39</sup> Treasury was responsible for all investment and debt financing for the City. Andrew understood

---

<sup>29</sup> Power 03/27/2003 at 96-97.

<sup>30</sup> Rabadi 06/24/2003 at 170.

<sup>31</sup> Power 03/27/2003 at 98-99.

<sup>32</sup> Power 03/27/2003 at 99.

<sup>33</sup> Power 03/27/2003 at 101-102.

<sup>34</sup> COT013706, 52:1:5.

<sup>35</sup> Brittain 07/09/2003 at 201.

<sup>36</sup> Brittain 07/09/2003 at 202.

<sup>37</sup> Brittain 07/09/2003 at 202.

<sup>38</sup> Brittain Affidavit, para.13, 07/09/2003 at 146.

<sup>39</sup> Andrew Affidavit, para.99, 09/24/2003 at 51-52.

that if a City initiative affected debt or debt financing the manager had to involve Treasury.

25. Brittain explained that he approached this meeting, and the subject of leasing generally, from a “broad brush perspective”, as part of a range of possible financial initiatives, but that in terms of the specific project which led to the RFQ in May 1999, it was I&T’s specific initiative to bring forward. Treasury approached this

[W]ith the view to exploring the financial feasibility, we had no pre-conceived ideas as to whether or not it would make financial sense but . . . – we thought it would make sense to explore it, at least, in some more rigorous fashion.<sup>40</sup>

26. Altman confirmed the view from the various divisions of Finance that I&T was the driver of the leasing program. Altman described the relationship with I&T at this stage as being “a client relationship where they were the driver of the project and we were assisting them”.<sup>41</sup> He elaborated:

I assumed it was the usual process of the program being the client, getting support from purchasing, and the two (2) of them combining to produce a document. And where we're involved then they would pass the document onto us for any other comments or issues that we might have. And at this time, we basically -- I took the position and I don't think that Nadir would have any different experience, that these were, sort of, standard things that were in our normal documents that the City put out.<sup>42</sup>

**a) I&T sought to establish a single vendor of record**

27. I&T was also attracted to leasing because it wanted to establish a leasing vendor of record for the City. As Power explained it:

Q: Did she [Viinamae] tell you at that time, Mr. Power, that the intent of the RFQ, among other things, was to acquire a vendor of record for leasing?

---

<sup>40</sup> Brittain 07/31/2003 at 54-55.

<sup>41</sup> Altman 07/03/2003 at 254.

<sup>42</sup> Altman 07/07/2003 at 15-16.

A: That's what we talked about, yeah.

Q: Tell us about that conversation. What was a vendor of record in your mind at the time?

A: Well, we would select one (1) leasing company that would be centrally managed and the departments would have access to it as well to lease products and services.<sup>43</sup>

28. From I&T's perspective, the advantages of establishing a vendor of record were considered to be administrative. As Power naively described it, a vendor of record provided for constant and consistent prices and conditions, thereby minimizing the need for constant negotiations.<sup>44</sup>

29. Power testified that the only two decision makers at the City capable of giving the green light to championing the idea of a single vendor of record leasing model were Andrew and Viinamae.<sup>45</sup> However, Power testified that Viinamae's limited experience meant that it was unlikely that she had decided to pursue the appointment of a vendor of record. He believed that Andrew made this decision.<sup>46</sup> He also agreed that Andrew wanted a single, exclusive vendor of record.<sup>47</sup> Power could not recall hearing that anybody else desired one vendor of record.<sup>48</sup> However, he testified that both Viinamae and Bulko were "quite familiar" with the intent to have one vendor of record, and with the ability for City users to employ another company only through a subsequent tender process.<sup>49</sup> Bulko was in no position to make such a decision. Bulko knew only what she was told about the program by Andrew and Viinamae.

---

<sup>43</sup> Power 03/06/2003 at 61.

<sup>44</sup> Power 03/27/2003 at 104.

<sup>45</sup> Power 03/27/2003 at 193.

<sup>46</sup> Power 03/27/2003 at 122-123.

<sup>47</sup> Power 03/27/2003 at 128.

<sup>48</sup> Power 03/27/2003 at 129.

<sup>49</sup> Power 03/27/2003 at 141.

#### 4. Power was not a leasing expert

30. At the Inquiry, Power frankly acknowledged that “I would by no means consider myself a leasing expert”.<sup>50</sup>

31. Nevertheless, he was assigned primary responsibility for the drafting and management of the computer leasing RFQ.<sup>51</sup> Although Andrew and Viinamae disagreed about who made that decision - each pointing at the other - they both erroneously believed that Power’s previous employment with the Province of Ontario adequately equipped him with the necessary expertise and experience. Power never disabused them of this notion.

32. Power’s previous technology leasing experience was with the Ministry of Government Services. Ironically, Power was instrumental in establishing that Ministry’s leasing program in 1992: as a vendor of record relationship with MFP.<sup>52</sup> In 1996, the program was re-tendered and the leasing contract was awarded to GE Capital.<sup>53</sup> Between 1992 and 1996, Power had frequent meetings with MFP individuals, primarily Irene Payne.

Q: Okay. Now, when you were at the Provincial Government then, and -- and managing the lease process to the extent that you did, did you have an opportunity to meet representatives of MFP?

A: Yes, we had fairly frequent meetings with MFP, especially Irene Payne, and occasionally Rob Wilkinson.

Q: And what did you understand to be the function of Ms. Payne, in connection with the leasing at the Province?

A: Well, she was our chief contact with MFP.

Q: And did you come to know her reasonable [sic] well?

A: Well, reasonably well in a business sense, yes.<sup>54</sup>

---

<sup>50</sup> Pagano 03/05/2003 at 155.

<sup>51</sup> Power 03/26/2003 at 271-272.

<sup>52</sup> Power 03/06/2003 at 77.

<sup>53</sup> Power 03/06/2003 at 77.

<sup>54</sup> Power 03/06/2003 at 78.

33. Power considered Wilkinson to be a leasing expert.<sup>55</sup> He knew Pessione from the time when Pessione was working in the Ministry of Community and Social Services. Pessione's project formed the basis for the Province's first leasing contract.<sup>56</sup> Power had only met Wolfraim once<sup>57</sup> and he had not met Ashbourne or Flanagan, and he only met Domi after MFP had been awarded the RFQ.<sup>58</sup>

---

<sup>55</sup> Power 03/06/2003 at 79.

<sup>56</sup> Power 03/06/2003 at 81.

<sup>57</sup> Power 03/06/2003 at 80.

<sup>58</sup> Power 03/06/2003 at 82.

## 5. Power drafted the RFQ

34. Power testified that he first learned of the City's interest in leasing information technology hardware when Viinamae asked him to work on the RFQ in April 1999.<sup>59</sup> Power understood that the RFQ, in addition to fulfilling Y2K needs, would also satisfy the general requirements of I&T following amalgamation.<sup>60</sup>

35. Viinamae denied that she interviewed or hired Power to work on the RFQ. She testified that Andrew asked her if Power could work on the RFQ, which she then communicated to Power.<sup>61</sup>

36. In his affidavit, Andrew asserted that Viinamae assigned Power the task of drafting the RFQ with his "knowledge and approval".<sup>62</sup> However, in his evidence, Andrew clarified that he asked Viinamae whether she could "free up" Power to work on the RFQ and whether Power could be the IT lead on the RFQ.<sup>63</sup> Andrew denied that he played any role whatsoever in the interviewing or hiring of Power for this or any position at the City.<sup>64</sup>

37. Andrew must be held primarily responsible for assigning Power the task of drafting the RFQ, and for failing to discharge this responsibility with objectivity and diligence. Andrew's two most significant failures occurred at the outset of the tender process. First, Andrew failed to designate a lead at the beginning of the largest tender process in the history of I&T. He agreed that it was his responsibility to formally designate a lead. Andrew considered Power to be the *de facto* lead, but did not identify him as the project manager.<sup>65</sup> Second, Andrew failed to ensure that Power, the man he hand-picked for the job without a competition, was qualified. In any case, Andrew, as

---

<sup>59</sup> Power 03/06/2003 at 59.

<sup>60</sup> Power 03/06/2003 at 69.

<sup>61</sup> Viinamae 10/16/2003 at 7.

<sup>62</sup> Andrew Affidavit, para. 98, 09/24/2003 at 51.

<sup>63</sup> Andrew 09/24/2003 at 213.

<sup>64</sup> Andrew Affidavit, para.34, 09/24/2003 at 22.

<sup>65</sup> Andrew 10/02/2003 at 102.

the Executive Director of I&T, was ultimately accountable for the 1999 tender process and, accordingly, for Power's role on the project.

38. Nonetheless, Viinamae must also be faulted for failing to ensure that Power was qualified for the job. Power reported to Viinamae prior to being assigned to the RFQ and she was best placed to determine whether or not Power had the appropriate skill set for the job.

**a) Andrew emailed Kassam draft RFQ to Power for review**

39. In his affidavit, Andrew testified that he met with Kassam and Domi on April 29, 1999.<sup>66</sup> During the meeting, Kassam and Domi showed Andrew a hard copy of an RFP document, which they told him was similar to the RFP template used by the Province of Ontario.<sup>67</sup> At the end of the meeting, Andrew returned the hard copy to Kassam, and Domi and Kassam subsequently provided him with Kassam's April 30, 1999 draft RFQ on diskette.<sup>68</sup> They told him that the City was free to use the document to help the City develop an RFP/RFQ.<sup>69</sup> Andrew testified that he did not request this document from them.<sup>70</sup>

40. On May 4, 1999 at 7:23 a.m., Andrew sent Power an email, asking him to "look over" the attached draft RFQ.<sup>71</sup> Andrew attached Kassam's April 30, 1999 draft RFP to the email.<sup>72</sup> Andrew indicated that he sent Kassam's draft RFQ to Power because:

Mr. Power was beginning to work on an RFP or an RFQ document for us for leasing, and I thought it would be worthwhile for him to review it and see if we could pick and choose from that document what we would maybe need for the new City.<sup>73</sup>

---

<sup>66</sup> Andrew 09/25/2003 at 87-88; Andrew Affidavit, para.42, 09/24/2003 at 24-25.

<sup>67</sup> Andrew 09/25/2003 at 90-91.

<sup>68</sup> Andrew 09/25/2003 at 90-93.

<sup>69</sup> Andrew 09/25/2003 at 90.

<sup>70</sup> Andrew 09/25/2003 at 93.

<sup>71</sup> COT074493, 63:7:25a.

<sup>72</sup> COT074494, 63:7:25a.

<sup>73</sup> Andrew 09/25/2003 at 95.

41. Andrew testified that he did not look at Kassam's draft RFQ in great detail prior to emailing it to Power.<sup>74</sup> He only surveyed it briefly with Kassam during their April 29, 1999 meeting.

42. In his affidavit, Kassam confirmed that he had not done any substantive work on the draft RFP:

I prepared the Draft Leasing RFP from a template that I had in my office. The only work I did to this Draft Leasing RFP was to enter certain information, such as the name "City of Toronto" into blank spaces in the template. I did not revise the substance of the template to particularize it to the circumstances of the City of Toronto's proposed Request for Proposal for Leasing.<sup>75</sup>

43. Andrew never sent Kassam's April 30, 1999 draft RFQ to anyone in Treasury, further evidence that Andrew believed that Power, not Treasury or PMMD, was responsible for drafting the RFQ. PMMD forwarded Power a general template, which Power testified was not very helpful.<sup>76</sup>

***b) The limited role of Treasury: May 1999 meeting between I&T and Treasury***

44. Representatives of I&T and Treasury met at least once, and possibly twice, in early to mid-May, 1999, to discuss the RFQ. The evidence on this issue is voluminous and contradictory. In the end, the City submits that is not necessary to determine the precise date and number of meetings. The City submits that on any view of the evidence, there were preliminary discussions about the RFQ involving Andrew, Power, Viinamae, Brittain, and Rabadi sometime in early to mid-May.

45. Power understood from a May meeting that Brittain, Altman, and Rabadi were familiar with the "issues around leasing and understood the financing mechanisms of

---

<sup>74</sup> Andrew 09/25/2003 at 95.

<sup>75</sup> Kassam Affidavit, para. 6-7, 06/09/2003 at 30-31.

<sup>76</sup> Power 03/06/2003 at 106.



the City”.<sup>77</sup> Power recalled discussions about the value of the assets to be leased as “a fairly substantial number of assets ... [p]robably in excess of fifty (50) [million dollars] and maybe not quite a hundred (100) [million dollars]”.<sup>78</sup>

46. Power gravely misunderstood the leasing experience of those from Treasury. Rabadi had never been involved in either an RFQ or an RFP prior to this draft RFQ, and did not know of any distinction between these two concepts.<sup>79</sup> Similarly, the 1999 tender was Altman’s first experience with a draft RFQ.<sup>80</sup> Brittain had no prior experience in public sector information technology leasing, nor had he had any training in leasing of any kind.<sup>81</sup>

47. Treasury understood that Power was a consultant who had considerable experience with computer leasing.<sup>82</sup> Treasury relied on Power and I&T generally to have sufficient leasing expertise.<sup>83</sup> Altman confirmed that they relied on the combined experience and expertise of Power, I&T, and PMMD to ensure the terms of the RFQ were appropriate. When asked whether he thought the 90 day guarantee period was sufficient, Altman stated

[F]rom my perspective this had been circulated by the two (2) parties who knew what they were doing. We have Brendan, who was projected to us as being a leasing expert and purchasing. And it was my understanding that they had both done this a lot and therefore what they had sent us would be, sort of, the opening sort of standard clauses. In which case, I don't think I would have -- it would not have occurred to me to spend much time re-jigging those, because I would have thought they would have a history of being successful in the past, for this kind of a process.<sup>84</sup>

---

<sup>77</sup> Power 03/06/2003 at 90.

<sup>78</sup> Power 03/06/2003 at 93.

<sup>79</sup> Rabadi 06/24/2003 at 225.

<sup>80</sup> Altman 07/07/2003 at 18.

<sup>81</sup> Brittain Affidavit, para. 15, 07/09/2003 at 147.

<sup>82</sup> Rabadi 06/24/2003 at 214-215.

<sup>83</sup> Brittain Affidavit, para. 15, 07/09/2003 at 147.

<sup>84</sup> Altman 07/07/2003 at 14-15.

48. Rabadi testified that he was invited to attend the May meeting because he was going to be responsible for undertaking the financial analysis of the responses to the RFQ.<sup>85</sup> In his affidavit, Rabadi discussed the content of the meeting he attended:

The I&T staff recommended leasing as a tool to control IT inventory and be able to refresh the equipment. I&T staff also stated an intention to return and replace assets at the end of any lease term.

We discussed the fact that the City had already purchased computer equipment in 1999 and that this equipment was to be leased. I do not recall anyone using the term 'sale and lease back' during this meeting.

It was agreed at this meeting that Treasury & Financial Services staff would perform a financial analysis on responses to a proposed RFQ.

I do not recall any reference at this meeting to a \$43 million asset value for leasing. I do not recall any discussion of which budgets would fund the leasing costs.<sup>86</sup>

49. Brittain recalled a meeting with Viinamae and Andrew in early May 1999 to discuss computer leasing.<sup>87</sup> He could not recall specific discussions from the meeting, but believed that the purpose of the meeting was to discuss the role for Treasury in connection with the lease versus purchase analysis in the then contemplated RFQ.<sup>88</sup>

***c) May 7, 1999 draft RFQ***

50. The first draft of the RFQ was dated May 7, 1999, and was entirely a product of Power's efforts.<sup>89</sup> Power testified that the focus of the first draft RFQ was on language.<sup>90</sup> He agreed that the draft was relatively incomplete, and contained no reference to the particulars, dollar value, or the timing of acquisition of the assets to be acquired.<sup>91</sup>

---

<sup>85</sup> Rabadi 06/24/2003 at 208.

<sup>86</sup> Rabadi Affidavit, paras.17-20, 06/24/2003 at 127.

<sup>87</sup> Brittain Affidavit, para. 16, 07/09/2003 at 147; COT013141, 52:1:6.

<sup>88</sup> Brittain Affidavit, para. 16, 07/09/2003 at 147.

<sup>89</sup> Power 03/06/2003 at 109; COT012834, 46:1:21.

<sup>90</sup> Power 03/06/2003 at 120.

<sup>91</sup> Power 03/06/2003 at 120.

51. As of April 1999, neither Power nor Viinamae knew the total asset value to be leased,<sup>92</sup> but they expected that the assets ultimately put on the lease would exceed the 65.4 million dollar budget from the Y2K final report. The asset value would grow as other departments put equipment on lease. The model Power suggested, gleaned from his time at the provincial government, was that other departments would also use the established leasing vendor for their purchases (after receiving budget approval for the expenditure).<sup>93</sup>

52. Power testified that he distributed the draft only to Rabadi, Viinamae, and Franey.<sup>94</sup> Power did not send the draft to anyone in PMMD and he did not expect PMMD to review the draft RFQ for form and content.<sup>95</sup>

53. Rabadi agreed that Power sent him a draft RFQ dated May 7, 1999.<sup>96</sup> He confirmed that he wrote his comments on the draft and sent it back to Power.<sup>97</sup> Brittain did not review Rabadi's handwritten changes to the May 7, 1999 draft RFQ.<sup>98</sup>

54. Viinamae testified that she did not see the May 7, 1999 draft RFQ, or any subsequent drafts of the RFQ.<sup>99</sup> In his affidavit, Franey swore that he had no involvement in the drafting of the RFQ, except for providing information about computer hardware and software configurations, budget allocations, and expected deliveries.<sup>100</sup>

**d) Andrew sent draft RFQ to Jakobek (May 17, 1999)**

---

<sup>92</sup> Power 03/06/2003 at 75-76.

<sup>93</sup> Power 03/06/2003 at 76.

<sup>94</sup> Power 03/06/2003 at 122-123, 125.

<sup>95</sup> Power 03/06/2003 at 107-108.

<sup>96</sup> Rabadi Affidavit, para. 21, 06/24/2003 at 127-128.

<sup>97</sup> Rabadi Affidavit, para. 21, 06/24/2003 at 127-128.

<sup>98</sup> Brittain 07/28/2003 at 101.

<sup>99</sup> Viinamae 10/20/2003 at 159.

<sup>100</sup> Franey Affidavit, paras.7,8,9, 08/07/2003 at 59.

55. On the evening of May 17, 1999, Andrew sent Jakobek an email, which attached an undated draft of the RFQ.<sup>101</sup> The content of the email read:

Tom, please find attached the draft leasing tender we are still waiting some [sic] input from Len.<sup>102</sup>

56. In his affidavit, Andrew agreed that he sent Jakobek a copy of the draft computer leasing RFQ on May 17, 1999, at Jakobek's request.<sup>103</sup> Jakobek received the draft RFQ only two weeks after he flew to Philadelphia with Domi on a private jet to watch a hockey game. Andrew also telephoned Jakobek at his work number the same day, but he could not recall the conversation.<sup>104</sup> He testified that Jakobek did not reply to the email, nor did Andrew request the still-pending input from Brittain.<sup>105</sup> Andrew found Jakobek's request very unusual:

It's a very unusual request to send something like that to [a Councillor] -- I'd never had that before.<sup>106</sup>

57. Draft tender documents are not shared with City Councillors. City Councillors must not interfere in the tender drafting and evaluation process. That process must be fair and must be seen to be fair by all bidders.

58. Andrew had always abided by this policy. However, on May 17, 1999, he sent Jakobek a copy of the draft computer leasing tender. He did so at Jakobek's request.

59. Although Jakobek denied requesting or reviewing the draft RFQ, Andrew would never have sent it to him unprompted. Only two weeks after Jakobek flew to Philadelphia with Domi, he asked for and obtained a draft of the computer leasing tender.

---

<sup>101</sup> COT074512, 86:1:9.

<sup>102</sup> COT074511, 98:2:16.

<sup>103</sup> Andrew Affidavit, para. 96, 09/24/2003 at 50; COT074511, 98:2:16.

<sup>104</sup> Andrew 09/24/2003 at 146.

<sup>105</sup> Andrew 09/24/2003 at 152.

<sup>106</sup> Andrew 09/24/2003 at 149.

**e) Power emailed draft RFQ to Viinamae and Franey for review (May 18, 1999)**

60. On May 18, 1999, Power emailed the second undated version of the draft RFQ to Viinamae and Franey for review. This draft was likely prepared shortly before Power sent the email on May 18.<sup>107</sup>

61. The email that attached the draft RFQ listed business decisions to be made before the City issued the RFQ, including term of lease, value of equipment, and refresh strategy.<sup>108</sup> Power expected that Viinamae and Franey would meet with him to discuss these business decisions.<sup>109</sup> Power recalled a subsequent meeting with Viinamae to discuss the required business decisions.<sup>110</sup> Ultimately, however, the final content of the required business decisions fell to Viinamae.<sup>111</sup>

62. Viinamae could not recall responding to this email.<sup>112</sup> She testified that Franey could have responded to Power's questions on her behalf because he would have had the required information.<sup>113</sup> However, she did not ask him to respond on her behalf, nor did she ever see a response from him.<sup>114</sup> Viinamae testified that she had general discussions with Power, but she could not specifically recall meeting with him after this email to discuss business decisions.<sup>115</sup> Viinamae also disagreed with Power's testimony that she was responsible for the final content of the business decisions. She testified that Andrew would have been responsible for the final content of these decisions.<sup>116</sup>

63. At this time, Franey was the Director of Operations. Power needed Franey to provide usage assumptions and the City's hardware and software configurations for the

---

<sup>107</sup> COT015661, 63:13:20.

<sup>108</sup> COT015660, 63:7:31.

<sup>109</sup> Power 03/06/2003 at 163-164.

<sup>110</sup> Power 03/06/2003 at 165.

<sup>111</sup> Power 03/06/2003 at 165-166.

<sup>112</sup> Viinamae 10/20/2003 at 171; Viinamae 10/30/2003 at 18.

<sup>113</sup> Viinamae 10/20/2003 at 172.

<sup>114</sup> Viinamae 10/20/2003 at 172-173.

<sup>115</sup> Viinamae 10/20/2003 at 173-175.

<sup>116</sup> Viinamae 10/20/2003 at 174-175.

RFQ.<sup>117</sup> Franey did not testify about whether or not he responded to the May 18, 1999 email. However, in his affidavit, Franey swore that his very limited involvement in the RFQ included providing information about computer hardware and software configurations, budget allocations, and expected deliveries.<sup>118</sup> Franey swore that he was asked to provide this information because Viinamae had asked him to coordinate with various project managers for Y2K purposes.<sup>119</sup> Power testified that he could not recall receiving a response from Franey, but that it would be unusual for Franey not to respond.<sup>120</sup> He indicated that Franey would probably have responded orally.<sup>121</sup>

**f) Power sent revised draft to Brittain (May 26, 1999)**

64. On May 26, 1999, Power emailed the third version of the draft RFQ, dated May 26, 1999,<sup>122</sup> to Brittain and Viinamae.<sup>123</sup> Power requested that Brittain review the draft and provide his comments as soon as possible. Power could not recall any communication or correspondence between the time of the second draft RFQ and the third one.<sup>124</sup>

65. Brittain received the May 26, 1999, draft from Power.<sup>125</sup> He testified that this was the first draft RFQ he had received from Power.<sup>126</sup> Brittain stated that he neither reviewed nor provided input into the form or content of the draft RFQ.<sup>127</sup> Brittain relied on his staff to provide such input and to tell him if his direct involvement was needed.

---

<sup>117</sup> Power 03/06/2003 at 162.

<sup>118</sup> Franey Affidavit, paras.7,8,9, 08/07/2003 at 59.

<sup>119</sup> Franey Affidavit, para.8, 08/07/2003 at 59; COT031465, 46:2:27; COT014135, 46:3:28; COT016044, 54:1:61; COT015633, 54:1:62.

<sup>120</sup> Power 03/06/2003 at 164-165.

<sup>121</sup> Power 03/06/2003 at 165.

<sup>122</sup> COT005220, 46:1:6.

<sup>123</sup> COT005219, 46:1:5.

<sup>124</sup> Power 03/06/2003 at 167.

<sup>125</sup> Brittain Affidavit, para.20, 07/09/2003 at 148-149.

<sup>126</sup> Brittain 07/28/2003 at 96.

<sup>127</sup> Brittain Affidavit, para.20, 07/09/2003 at 148-149.

His staff did not request his involvement and they raised no concerns with him. He did not recall seeing the RFQ in its final form before it was issued on May 31, 1999.<sup>128</sup>

66. Rabadi stated that Brittain provided him with the May 26, 1999 draft for his comments.<sup>129</sup> He added his comments and returned the draft to Power. Rabadi testified that his changes were incorporated into the final RFQ.<sup>130</sup>

67. Viinamae testified that she did not open the draft RFQ attachment to the email.<sup>131</sup> She believed that Power was “just letting her know” that he had started working on the RFQ.<sup>132</sup> Viinamae indicated that since Power was working on both the Y2K Project for her and the RFQ at Andrew’s request, she assumed that he was reporting to her and keeping her updated.<sup>133</sup> From the May 26, 1999 draft to the issuance of the RFQ, Power could not recall discussing any changes to be made with Viinamae.<sup>134</sup>

***g) Spizarsky forwarded May 26 draft to Beattie***

68. On May 27, 1999, Spizarsky sent Beattie an email, instructing him to work with Power to issue the RFQ hardware and software “as soon as possible”.<sup>135</sup> Attached to the email was a draft quotation document for leasing services from Power.<sup>136</sup> Power deduced that Spizarsky forwarded the May 26, 1999 draft version of the RFQ to Beattie.<sup>137</sup> This was Beattie’s first involvement with the RFQ.<sup>138</sup>

69. Beattie did not discuss the draft RFQ directly with I&T, having received it from Spizarsky by email with the direction that it was to be issued as soon as possible. Beattie’s review was limited to checking to ensure that the draft RFQ was not obviously

---

<sup>128</sup> Brittain Affidavit, para.21, 07/09/2003 at 149.

<sup>129</sup> Rabadi Affidavit, para.22, 06/24/2003 at 128.

<sup>130</sup> Viinamae 05/25/2003 at 21.

<sup>131</sup> Viinamae 10/16/2003 at 13-14.

<sup>132</sup> Viinamae 10/16/2003 at 14.

<sup>133</sup> Viinamae 10/16/2003 at 14.

<sup>134</sup> Power 03/06/2003 at 176.

<sup>135</sup> Beattie Affidavit, paras. 42-43, 03/31/2003 at 69-70; COT005800, 24:1:20; COT005801, 24:1:21.

<sup>136</sup> COT005801, 24:1:21; Beattie Affidavit, para.42, 03/31/2003 at 69-70.

<sup>137</sup> Power 03/06/2003 at 177.

deficient or otherwise in breach of PMMD requirements. More particularly, he reviewed it to ensure that it described the leasing services for information technology products in a sufficiently non-restrictive manner to allow as many bidders as possible to respond, and that the language used reflected proper purchasing concepts, such as the use of the words "quotation" and "respondents", instead of the words "proposal" and "proponents", which were inappropriate for an RFQ.<sup>139</sup>

70. Beattie did not scrutinize the RFQ for issues related to the business aspects of the proposed lease program. Such issues included the reference in clause 1.1.21 to major software acquisitions and in clause 1.1.17 to the 90 day guarantee period. As Beattie stated in his affidavit, "[w]hether or not 90 days is sufficient to achieve the Department's objective is for them to determine".<sup>140</sup>

71. Power and Beattie discussed changes to the draft, including process and boilerplate additions.<sup>141</sup>

#### ***h) RFP versus RFQ***

72. In his affidavit, Beattie noted that the document was drafted in the form of an RFQ, although some of its language was imprecise and it used RFP in places.

73. RFQs are used when the purchaser knows the product and the quantity of product to be purchased. The only question to be answered through the procurement exercise is who can provide the specified goods at the lowest price. In contrast, RFPs are used when the purchaser has a need, requires a solution and does not know the possible products and/or quantities of products to be purchased.<sup>142</sup> RFPs require more detail than RFQs together with scoring criteria and an invitation for bidders to provide

---

<sup>138</sup> Beattie 03/31/2003 at 124.

<sup>139</sup> Beattie Affidavit, paras. 42, 46, 03/31/2003 at 69-71.

<sup>140</sup> Beattie Affidavit, paras. 49-50, 03/31/2003 at 72-73.

<sup>141</sup> Power 03/06/2003 at 178.

<sup>142</sup> Beattie 03/31/2003 at 155-156; Power 03/27/2003 at 171-172.



solutions to a stated need.<sup>143</sup> Responses to RFPs are scored against the criteria specified in the bid document, and the highest scoring proponent is normally awarded the contract.<sup>144</sup>

74. Power testified that Spizarsky and Beattie directed him to draft an RFQ, not an RFP.<sup>145</sup> Beattie testified that he never spoke with Power about which type of document he should use.<sup>146</sup>

***i) I&T wanted to create a vendor of record relationship***

75. At the Inquiry, Power took the position that the computer leasing procurement document should have been drafted as an RFP.<sup>147</sup> His position was premised on his evidence that I&T was trying to establish a three-year vendor of record relationship through the RFQ.<sup>148</sup>

76. Although Power testified that he told Spizarsky and Beattie that the intent of the bidding process was to establish a vendor of record,<sup>149</sup> he could not recall any specific conversations, or point to a single memo or communication with anyone else in PMMD, which supported this testimony.<sup>150</sup> Eventually he acknowledged that it was “quite possible” that he never told anyone in PMMD that I&T sought to establish a single vendor of record.<sup>151</sup>

77. Beattie did not understand from his involvement with the RFQ that I&T intended to procure a leasing provider as an open-ended vendor of record for leasing all information and technology acquisitions through this RFQ.<sup>152</sup> Beattie was adamant that Power never told him that the objective of the tender was to establish a vendor of record

---

<sup>143</sup> Beattie Affidavit, para. 42, 03/31/2003 at 69-70.

<sup>144</sup> Pagano 02/24/2003 at 142.

<sup>145</sup> Power 03/06/2003 at 106; Power 03/27/2003 at 146.

<sup>146</sup> Beattie 03/31/2003 at 130.

<sup>147</sup> Power 03/25/2003 at 136-137.

<sup>148</sup> Power 03/27/2003 at 153.

<sup>149</sup> Power 03/27/2003 at 153, 155-156.

<sup>150</sup> Power 03/27/2003 at 155.

<sup>151</sup> Power 03/27/2003 at 156-157.

<sup>152</sup> Beattie Affidavit, para. 51, 03/31/2003 at 73.

for the City.<sup>153</sup> Pagano testified that PMMD did not use the term “vendor of record” in purchasing,<sup>154</sup> which supports the inference that if Power ever used the term with PMMD it would have raised a red flag.

78. The evidence of Beattie and Pagano should be accepted over Power’s evidence on the issue of what Power told them that I&T sought to achieve.

79. On the secondary question of whether an RFP or RFQ was preferable, Beattie testified that at the time the document was drafted, he thought that “it could have gone out either way”.<sup>155</sup> If, however, the intention was to create a vendor of record relationship, then Beattie agreed, “[i]t definitely should have” been an RFP.<sup>156</sup>

***ii) I&T never told Treasury it wanted to create a vendor of record relationship***

80. Brittain testified that he never realized that I&T’s intention was to establish a vendor of record relationship.<sup>157</sup> He did not recall discussions that purportedly contradicted this understanding.<sup>158</sup> Brittain explained that despite seeing documents long after MFP won the bid, such as the CMO Report, that used the term “vendor of record”, he did not consider the City to be using the proper sense of the term.<sup>159</sup> Instead, he believed the City was using the term “vendor of record” to mean that MFP was the vendor that would provide leases for up to 43 million dollars of equipment.<sup>160</sup> Finally, Brittain testified that he was not aware that I&T staff believed MFP was the leasing vendor of record for all computer acquisitions as a result of winning the RFQ.<sup>161</sup>

---

<sup>153</sup> Beattie 03/31/2003 at 130.

<sup>154</sup> Pagano 03/05/2003 at 34.

<sup>155</sup> Beattie 03/31/2003 at 157.

<sup>156</sup> Beattie 03/31/2003 at 158.

<sup>157</sup> Brittain 07/28/2003 at 29.

<sup>158</sup> Brittain 07/28/2003 at 167.

<sup>159</sup> COT013070, 52:2:21; Brittain 07/30/2003 at 215-216.

<sup>160</sup> Brittain 07/29/2003 at 156-157.

<sup>161</sup> Brittain Affidavit, para.47, 07/09/2003 at 157.

81. Altman testified that in May 1999, his understanding was that the one or more successful bidders on the RFQ would acquire vendor of record status.<sup>162</sup> Later, he clarified that this was his understanding of the intention of I&T.<sup>163</sup> Altman could not explain why the May 7, 1999 draft RFQ did not refer to vendor of record status, particularly since “that concept and those terms are the ones that IT use[d] all the time, in my experience”.<sup>164</sup> Altman testified that his understanding of a vendor of record relationship was much narrower than the sense in which I&T used the term, and that, effectively, the successful bidder was the vendor of record for 43 million dollars of pre-approved computer equipment.<sup>165</sup>

82. In her affidavit, Liczyk stated that she did not believe that the RFQ contemplated a vendor of record for three years.<sup>166</sup> Despite the fact that senior staff at I&T believed the RFQ would create a vendor of record relationship, Liczyk testified that she did not share that understanding.<sup>167</sup>

***iii) Comparison of the May 26, 1999 draft to the RFQ***

83. Beattie had a relatively limited role in the RFQ drafting process. He reviewed the draft RFQ, but only to the extent of ensuring that it conformed to PMMD requirements.<sup>168</sup> Specifically, he reviewed it to ensure that it described the leasing services required in a sufficiently non-restrictive manner to allow as many bidders as possible to respond, and to ensure that the language used reflected proper purchasing concepts.<sup>169</sup> Beattie also attached the boilerplate provisions to the RFQ.<sup>170</sup>

84. There were very few changes between the May 26 draft and the RFQ that the City issued.<sup>171</sup> The City issued the RFQ on May 31, 1999, two business days after

---

<sup>162</sup> Altman 07/07/2003 at 13.

<sup>163</sup> Altman 07/07/2003 at 196.

<sup>164</sup> Altman 07/07/2003 at 14.

<sup>165</sup> Altman 07/09/2003 at 138.

<sup>166</sup> Liczyk Affidavit, para. 157, 11/03/2003 at 63.

<sup>167</sup> Liczyk 11/18/2003 at 139.

<sup>168</sup> Beattie Affidavit, para.12, 03/31/2003 at 57-58.

<sup>169</sup> Beattie Affidavit, para. 12, 03/31/2003 at 57-58.

<sup>170</sup> Beattie Affidavit, para.13, 03/31/2003 at 59.

<sup>171</sup> Power 03/24/2003 at 17.

Spizarsky's May 27, 1999 email to Beattie in which Beattie was first instructed to work on the RFQ.

85. The major difference between the May 26 draft and the RFQ that was issued was that the May 26 draft contained a chart setting out the estimated leasing volumes, and the final RFQ did not.<sup>172</sup>

86. Beattie did not know the cost of the leasing transaction until after the City issued the RFQ on May 31, 1999, when prospective bidders began phoning him with questions about technology configurations and estimated leasing volumes.<sup>173</sup> Beattie agreed that, ordinarily, he would have had a sense of the total asset value of the acquisition before the RFQ was issued.<sup>174</sup> He later issued an Addendum dated June 7, 1999 containing this information, at the request of bidders.<sup>175</sup>

#### ***iv) Legal advice***

87. Power testified that he did not consider approaching external counsel for legal advice during the RFQ drafting process.<sup>176</sup> This is particularly troubling given his stated intention to create such a significant vendor of record relationship. It is extremely important for legal to be involved at an early stage in the procurement process.

---

<sup>172</sup> COT005220, 46:1:6.

<sup>173</sup> Beattie 03/31/2003 at 134.

<sup>174</sup> Beattie 03/30/2003 at 133.

<sup>175</sup> Beattie Affidavit, para. 57, 03/31/2003 at 75; COT003902; COT003903; COT003907; COT003908; 11:2:46.

<sup>176</sup> Power 03/27/2003 at 271.

## 6. RFQ was issued May 31, 1999

88. Beattie affirmed that he was charged with finalizing the draft of the RFQ on behalf of PMMD, together with Power.<sup>177</sup> He did not thoroughly review it and relied on Power's supposed expertise.

Q: In order to ensure a fair, competitive process, would it not be expected of the Purchasing Department to review the entire RFQ?

A: I would say, yes, now.

Q: Yeah, but at that time you didn't believe that –

A: No.

Q: -- it was necessary, or did you not have time to do it?

A: No, I believe because of the expertise that they were indicating that Brendan had –<sup>178</sup>

89. Pagano testified that he did not recall having any knowledge of the RFQ at the time, and that it was a standard transaction that would likely not be brought to his attention.<sup>179</sup> However, Beattie testified that Pagano also reviewed the draft of the RFQ before it was issued.<sup>180</sup> Ultimately, they both agreed with Pagano's statement:

I guess with the benefit of hindsight, if I would have gone through this document thoroughly, there would have been things that I might have questioned. But, I did not go through it and I don't believe my staff went through it thoroughly. It's not something that we do, because we're not familiar with the requirements of departments.<sup>181</sup>

---

<sup>177</sup> Beattie 03/31/2003 at 217.

<sup>178</sup> Beattie 03/31/2003 at 218.

<sup>179</sup> Pagano 02/25/2003 at 46-47.

<sup>180</sup> Beattie 03/31/2003 at 216.

<sup>181</sup> Pagano 02/25/2003 at 60; Beattie 03/31/2003 at 220-222.

90. Power testified that, in retrospect, he would have included the 43 million dollar figure in the RFQ with respect to the hardware and software configurations.<sup>182</sup> He would also have included more detail about the intent of the sale/leaseback transaction.

91. When Beattie was asked about who was ultimately responsible for the form of the RFQ, he responded:

Q: Okay. And I think you've now agreed that had this document draft document that became the RFQ, if that had been reviewed thoroughly, this document may very well have been properly put to the public as an RFP, is that right?

A: Yes.

Q: And who would bear responsibility for that decision, would it be you or Mr. Spizarsky or Mr. Power?

A: It's probably a combination of all three (3).<sup>183</sup>

92. Brittain could not recall seeing the RFQ in its final form before it was issued on May 31, 1999, nor did he see or comment upon the Addendum documents which followed.<sup>184</sup>

93. Altman testified that he did not see the RFQ in its final form before it was issued on May 31, 1999.<sup>185</sup> He indicated that after Treasury sent the May 26, 1999 draft RFQ back to Power with comments, he expected some communication prior to the release of the RFQ.<sup>186</sup> A few days later, Altman was surprised to hear that the RFQ had been issued.<sup>187</sup> He inferred from this sequence of events that Treasury was not apprised of a final version of the RFQ before it was issued.<sup>188</sup>

---

<sup>182</sup> Power 03/24/2003 at 21-22.

<sup>183</sup> Beattie 03/31/2003 at 220-221.

<sup>184</sup> Brittain Affidavit, para.21, 07/09/2003 at 149; COT006102, 46:1:65; COT006104, 46:1:66; COT003902, 46:1:67.

<sup>185</sup> Altman 07/08/2003 at 54-55.

<sup>186</sup> Altman 07/08/2003 at 55.

<sup>187</sup> Altman 07/08/2003 at 55-57.

<sup>188</sup> Altman 07/08/2003 at 57.

94. Andrew testified that he was on vacation and out of the country from May 25, 1999 to June 1, 1999.<sup>189</sup> He assigned Viinamae to act for him in his absence. By the time Andrew returned to the office on June 1, 1999, the RFQ had been finalized and distributed on May 31, 1999 by PMMD.<sup>190</sup> Andrew did not review the RFQ either before or after its release to the public.<sup>191</sup> He relied on the skills of Power, Beattie, and Rabadi.<sup>192</sup>

95. Viinamae claimed that she had no role in drafting the RFQ.<sup>193</sup> Although she understood her role as Acting Executive Director during Andrew's absence to include dealing with any issues that arose, she did not understand that role to encompass day-to-day operations, such as reviewing the draft RFQ.<sup>194</sup> She added that Andrew did not ask her to do so.<sup>195</sup> Viinamae testified that she did not see the RFQ at all before it was issued.<sup>196</sup> She indicated that she was not aware of the timeline for the issuance of the RFQ, and did not know it was to be issued before the end of May 1999.<sup>197</sup> Viinamae should have been more involved in the process.

96. Liczyk testified that she was not involved in drafting or reviewing the RFQ which was released on May 31, 1999.<sup>198</sup> She considered Brittain to be the "lead" on the RFQ drafting for Finance. Brittain did not report back to her on the RFQ process, nor would she have expected him to.<sup>199</sup>

97. According to Brittain, sometime in early 1999 Liczyk asked Brittain to begin a preliminary financial analysis of leasing as a concept.<sup>200</sup> After the City of Toronto issued the RFQ, Brittain assigned Altman to the project of developing a model to compare the

---

<sup>189</sup> Andrew Affidavit, para.102, 09/24/2003 at 52-53.

<sup>190</sup> Andrew Affidavit, para.103, 09/24/2003 at 53.

<sup>191</sup> Andrew Affidavit, para. 103, 09/24/2003.

<sup>192</sup> Andrew Affidavit, para. 103, 09/24/2003.

<sup>193</sup> Viinamae Affidavit, para.38, 10/15/2003 at 20-21.

<sup>194</sup> Viinamae 10/16/2003 at 17.

<sup>195</sup> Viinamae 10/16/2003 at 17.

<sup>196</sup> Viinamae 10/20/2003 at 169.

<sup>197</sup> Viinamae 10/20/2003 at 170-171.

<sup>198</sup> Liczyk Affidavit, para.129, 11/03/2003 at 53-54.

<sup>199</sup> Liczyk Affidavit, para.129, 11/03/2003 at 53-54.

<sup>200</sup> Brittain Affidavit, para.18, 07/09/2003 at 148.

cost of leasing to the cost of debenture financing.<sup>201</sup> Altman in turn assigned the project to Rabadi. Brittain did not maintain daily or hands-on involvement in the project.<sup>202</sup> Brittain met with his Treasury colleagues to discuss the general approach for the analysis of the lease versus purchase options.<sup>203</sup> In addition, he received copies of email communications, but did not notice anything unexpected or out of the ordinary.<sup>204</sup>

**a) Addendum on June 7, 1999**

98. After the City issued the RFQ and before it closed, prospective bidders phoned Beattie with questions about the City's technology configurations and estimated leasing volumes.<sup>205</sup> Beattie was listed on the RFQ as the contact person for such inquiries. Beattie sought information from Power in order to answer these questions.

99. On June 4, 1999, Power sent Beattie an email containing the City's standard hardware and software configurations in order to address the bidders' concerns.<sup>206</sup>

100. On June 7, 1999, Beattie issued an addendum to the RFQ in Spizarsky's name, which contained the information provided by Power on detailed hardware and software configurations and estimated leasing volumes.<sup>207</sup> The addendum incorporated the estimated leasing volumes chart, setting out the volumes by asset type and approximate value, which had appeared in an earlier draft of the RFQ.<sup>208</sup> Power testified that the numbers that comprised the approximate values were provided by various vendors of the equipment to the City.<sup>209</sup> Spizarsky signed the addendum. Beattie sent the addendum by fax to all the companies that received the original RFQ.

---

<sup>201</sup> Brittain Affidavit, para. 18, 07/09/2003 at 148.

<sup>202</sup> Brittain Affidavit, para.19, 07/09/2003 at 148.

<sup>203</sup> Brittain Affidavit, para. 19, 07/09/2003 at 148.

<sup>204</sup> Brittain Affidavit, para.19, 07/09/2003 at 148.

<sup>205</sup> Beattie Affidavit, para.55, 03/31/2003 at 75.

<sup>206</sup> Beattie Affidavit, para.56, 03/31/2003 at 75; COT003914, 24:1:6.

<sup>207</sup> Beattie Affidavit, para.57, 03/31/2003 at 75; COT003902; COT003903; COT003907; COT003908; 11:2:48

<sup>208</sup> Power 03/24/2003 at 30-31.

<sup>209</sup> Power 03/24/2003 at 31-32.



**b) RFQ closed at noon on June 11, 1999**

**i) Domi phone call to Andrew that morning**

101. Domi called Andrew on June 11, 1999 at 8:45 a.m.<sup>210</sup> The phone call lasted two minutes and twenty-eight seconds. Domi testified that the purpose of the call was to communicate to Andrew that MFP was prepared and ready to submit its bid.<sup>211</sup> Although the phone call took place before MFP submitted its bid, Domi denied that they discussed the form or content of MFP's bid.<sup>212</sup>

102. Andrew gave evidence that Domi called him to inform him that the MFP bid would be in on time.<sup>213</sup> Andrew did not consider this unusual; rather, he considered such communication to be an acceptable practice in the vendor community.<sup>214</sup> This phone call was highly inappropriate and created the appearance of an inappropriate relationship between Andrew and Domi. It raised a serious question as to whether Domi obtained inappropriate information from Andrew.

103. Power testified that he had no interaction with any of the bidders between the issuance of the RFQ on May 31, 1999 and the closing of the bidding process on June 11, 1999.<sup>215</sup>

**c) PMMD process to open bids**

104. Beattie stated that it was common practice for the City to conduct a public opening of all bids received and to read out the identity of the bidders. A buyer (not necessarily the buyer assigned to the call) and one other PMMD staff person would also, in most circumstances, read out the prices.<sup>216</sup> Pagano confirmed this practice,

---

<sup>210</sup> COT077332 at COT077332, 15:2:52; Domi 02/11/2003 at 117-118.

<sup>211</sup> Domi 02/11/2003 at 119.

<sup>212</sup> Domi 02/11/2003 at 119.

<sup>213</sup> Andrew 09/25/2003 at 139; Andrew Affidavit, para.48, 09/24/2003 at 28-29.

<sup>214</sup> Andrew 09/25/2003 at 139; Andrew Affidavit, para.48, 09/24/2003 at 28-29.

<sup>215</sup> Power 03/24/2003 at 33.

<sup>216</sup> Beattie Affidavit, para. 18, 03/31/2003 at 60-61.

noting that, upon receipt, the tenders were date and time stamped, and then opened in public on the 18th floor of the West Tower in City Hall.<sup>217</sup>

105. In some circumstances, where a large volume of responses was anticipated or where there would be many prices in each response, the RFQ would state that prices would not be read aloud at the public opening. Bidders would be given the opportunity to make an appointment with the responsible buyer to view the prices after the public opening or to have the prices provided to them.<sup>218</sup> However, Beattie acknowledged that when he conducted a public opening, he occasionally read out prices even where the RFQ document indicated that prices would not be read aloud.<sup>219</sup>

106. In this case, the RFQ documents were not consistent regarding whether or not the quotations would be read aloud. The first page of the RFQ stated that “Unless otherwise indicated you are invited to attend a public opening of this quotation at the time and location indicated above. The prices will be read aloud [at the time of the public opening] and will not be made available by telephone until AFTER the award has been made.”<sup>220</sup> However, the second page stated that “Due to the large number of anticipated bids and/or items for this quotation, prices will not be read aloud at the public opening.”<sup>221</sup>

107. Debbie Cochrane was the buyer responsible for opening the bids, together with a clerk named Maria Fuina, on June 11, 1999. She could not recall whether prices were read out.<sup>222</sup> However, the physical folder containing the responses lacked a note attached to the front; such a note is usually present in cases where the responses are not read out.<sup>223</sup> In addition, inside the front cover of the folder is a notation that reads “MFP”. Although Pagano had no direct knowledge of the June 11, 1999 public opening,

---

<sup>217</sup> Pagano 02/24/2003 at 165.

<sup>218</sup> Beattie Affidavit, para.18, 03/31/2003 at 60-61.

<sup>219</sup> Beattie Affidavit, para.19, 03/31/2003 at 61.

<sup>220</sup> COT006104, 11:2:31

<sup>221</sup> COT006104, 11:2:31.

<sup>222</sup> Pagano 02/24/2003 at 176; Pagano 02/25/2003 at 5-6.

<sup>223</sup> Pagano 02/25/2003 at 9-10.

he testified that the buyer conducting the public opening would write the names of the companies present inside that front cover.<sup>224</sup>

108. Beattie did not attend the public opening on June 11, 1999.<sup>225</sup>

109. Domi and Pessione testified that they were present when the bids were opened.<sup>226</sup> Their evidence on this point should be accepted. This would mean that they would know that MFP submitted the lowest bid response to the RFQ.

***i) Responses to the RFQ***

110. Six bidders submitted formal responses to the RFQ. The bidders included:

- a. SHL Systemhouse;<sup>227</sup>
- b. Compaq;<sup>228</sup>
- c. IBM;<sup>229</sup>
- d. Dell Financial;<sup>230</sup>
- e. Bombardier;<sup>231</sup> and
- f. MFP.<sup>232</sup>

---

<sup>224</sup> Pagano 02/25/2003 at 11-12.

<sup>225</sup> Beattie Affidavit, para. 20, 03/31/2003 at 61.

<sup>226</sup> Domi 02/11/2003 at 206; Pessione 02/13/2003 at 58-60.

<sup>227</sup> COT005767, 46:1:71; COT005768, 46:1:72; COT005769, 46:1:73.

<sup>228</sup> COT018043, 46:1:74.

<sup>229</sup> COT018047, 46:1:75.

111. The six responses quoted varying monthly lease rates per \$1,000 of equipment, as set out in the following chart. MFP clearly quoted the lowest rates:

Supplier	Desktops	Other Hardware	Software
SHL Systemhouse	27.47	27.78	30.87
Compaq	28.58	29.15	31.41
IBM	26.31	27.00 – 28.49	30.87
Dell Financial	27.20	26.35 – 27.20	30.87
Bombardier	28.90	28.90 – 29.30	30.60
<b>MFP</b>	<b>25.30</b>	<b>25.30</b>	<b>30.48</b> <sup>233</sup>

*ii) June 11, 1999 memorandum*

112. PMMD did not review the substantive content of the responses to the RFQ. As discussed above, it was PMMD's standard practice to provide the responses to the initiating department for their review and analysis.<sup>234</sup>

113. On June 11, 1999, Beattie assembled the bids and sent them to Power on behalf of Spizarsky.<sup>235</sup> In addition, on June 11, 1999, Spizarsky sent a memo to Power which enclosed the six responses to the RFQ.<sup>236</sup> This memo directed Power to examine the six quotations and to make a recommendation for the successful bidder. In the bottom left-hand corner were Beattie's initials. His initials appeared on the memo because he assembled the bids and sent them to Power for review and evaluation.<sup>237</sup>

<sup>230</sup> COT003979, 46:1:76.

<sup>231</sup> COT018032, 46:1:73.

<sup>232</sup> COT023413, 46:1:78.

<sup>233</sup> COT032203 at COT032209; 48:1:20.

<sup>234</sup> COT030534, 20:1:32.

<sup>235</sup> Beattie 03/31/2003 at 140.

<sup>236</sup> COT005765, 2:1.1:7.

<sup>237</sup> Beattie 03/31/2003 at 140.

114. The memorandum referenced a letter from Power to Spizarsky dated May 19, 1999. Power could not locate the May 19 letter in his records.<sup>238</sup> Spizarsky sent the memorandum only to Power and requested:

Please examine these quotations, considering only the quotations submitted with this letter, and let me have your recommendation.

---

<sup>238</sup> Power 03/24/2003 at 11.